

SPONSORS:\_\_\_\_\_

**DELAWARE HOUSE OF REPRESENTATIVES**

**143<sup>rd</sup> GENERAL ASSEMBLY**

**HOUSE BILL NO. \_\_\_\_\_**

AN ACT TO AMEND TITLE 29, RELATING TO THE TRANSFER OF DEVELOPMENT RIGHTS AND THE CREATION OF COMMUNITY DEVELOPMENT DISTRICTS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (two-thirds of the members of each house concurring):

Section 1. This Act shall be known as "The Transfer of Development Rights and Community Development District Act."

Section 2. Amend Chapter 91 of Title 29 of the Delaware Code to provide for a new Subchapter III to read as follows:

**Subchapter III. Transfer of Development Rights and Banking Program**

**§9131. Findings and Purposes.**

The General Assembly finds that a critical need exists to provide for orderly growth that maintains a desirable quality of life, to encourage well-designed and efficient communities rather than inefficient sprawl, to preserve farmland, cultural and historic lands, and other sensitive lands identified by the State and local governments, and to assist in the creation and maintenance of a market for the sale and purchase of development rights. The adoption of a transfer of development rights and banking program that encourages and facilitates the voluntary participation of county and municipal governments is a means of achieving those objectives. It is the purpose of this Subchapter to establish the framework, guidelines and incentives for the adoption of transfer of developments rights programs by Counties and Municipalities that serve to direct growth and development to areas having adequate infrastructure to accommodate such growth and development, while providing permanent protection to valuable agricultural lands, open space, cultural and historic lands, and critical and sensitive areas.

**§9132. Definitions.**

For purpose of this Subchapter the following definitions shall apply:

- (a) **'Bank'** shall mean the depository for TDR Units, which are purchased or received by the Board;
- (b) **'Board'** shall mean the TDR Banking Board established by each County under this Subchapter;
- (c) **'County'** shall mean any county in Delaware; namely, New Castle County, Kent County or Sussex County;
- (d) **'Delaware Agricultural Lands Preservation Program'** shall mean the program established and operated by the Foundation pursuant to the provisions of 3 Del. C. Chapter 9;
- (e) **'Development Unit'** shall mean a residential dwelling unit or defined equivalent for nonresidential uses;
- (f) **'Floor Area Ratio'** shall mean the ratio of gross floor area of all structures on the parcel to the total land area of the parcel.
- (g) **'Foundation'** shall mean the Delaware Agricultural Lands Preservation Foundation;
- (h) **'Guideline'** shall mean the substantive provisions adopted by a Board after consultation with Counties and Municipalities and after public hearings to be used by Municipalities and Counties in:
  - (1) developing the criteria for determining and utilizing TDR Units; and
  - (2) adopting provisions for operation of a TDR Program subject to this Subchapter.
- (i) **'Municipality'** shall mean a municipal government established by the State of Delaware and having defined geographic boundaries.
- (j) **'Preservation District'** shall mean an agricultural preservation district as referenced in Subchapter II of Chapter 9, Title 3 of the Delaware Code.
- (k) **'Preservation Easement'** shall mean an easement as defined in 3 Del. C. §902(11).
- (l) **'Receiving Parcel'** shall mean the parcel of land that is subject to the transfer of TDR Units, and for which the owner of the parcel is entitled to an increase in development density.
- (m) **'Sending Parcel'** shall mean the parcel of land from which TDR Units are obtained and use restrictions are imposed.
- (n) **'TDR'** shall mean transfer of development rights.
- (o) **'TDR Unit'** shall mean a residential development unit or equivalent, which is acquired from the Bank or from a private property owner and utilized by the owner of the Receiving Parcel to increase development density. A TDR unit shall equal one residential unit. The bank board for each County, as enabled by this subchapter, shall determine the conversion value of a TDR unit that is to be used for non-residential density transfers, which shall be between 3,000 to 6,000 square feet of building space per acre of restricted land.

### **§9133. TDR Banking Board.**

- (a) Each County shall establish a TDR Bank and a TDR Banking Board. In lieu of establishing a TDR Banking Board, a County may authorize the Foundation or other non-profit entity to administer the TDR program in accordance with §9138 of this subchapter.

- (b) Should a County establish a Board, the Board shall have at least 7 but no more than 11 members, and shall include at least one member or representative as follows:
- (1) A representative from the Office of State Planning Coordination shall serve as an ex-officio member, to be selected by the Governor;
  - (2) An active, full-time farmer land-owner nominated by the Council of Farm Organizations;
  - (3) A representative of the home building industry, to be nominated by the Delaware Homebuilders Association;
  - (4) A representative of the Delaware League of Local Governments, to be selected by the Delaware League of Local Governments;
  - (5) A representative from the Delaware Agricultural Lands Preservation Foundation, to be selected by the Secretary of Agriculture.
- (c) Each Board shall be empowered, without limitation and notwithstanding any other laws:
- (1) To adopt procedural rules, without public hearing, to conduct its affairs and carry out and discharge its powers, duties and functions. A simple majority of the Board shall be required for all actions by the Board. Two-thirds of the total members of the entire Board shall constitute a quorum.
  - (2) To adopt substantive rules and regulations, after public hearing and in accordance with the Delaware Administrative Procedures Act, Title 29, Chapter 101, to carry out and discharge its powers, duties and functions. A simple majority of the Board shall be required for all actions by the Board.
  - (3) To enter into agreements for consultant, appraisal, legal, accounting, audit and other services deemed advisable or necessary in the exercise of its purposes and powers and upon such terms as it deems appropriate, subject to available funding.
  - (4) To establish the criteria for the purchase and sale of TDR Units, which may include transactions that do not involve the TDR Bank.
  - (5) To purchase or receive, by gift or otherwise, and retain if desired, TDR Units under such terms and conditions deemed appropriate.
  - (6) To sell TDR Units under such terms and conditions as deemed appropriate.
  - (7) To develop and utilize documents as desirable or necessary to engage in TDR transactions.
  - (8) To enter into agreements with Counties and Municipalities, State agencies, Authorities, Foundations and instrumentalities of the State and adopt guidelines for participation and operation of the TDR program.
  - (9) To authorize an agent or agents to act on its behalf, and delegate authorization to the Chairperson to act on behalf of the Board on specific matters.
  - (10) To receive, deposit, withdraw and expend monies from dedicated State accounts for the purpose of engaging in and completing TDR transactions, including the payment of transaction costs related thereto.

- (11) To establish use restrictions on Sending Parcels as deemed desirable and necessary, which restrictions shall not, at a minimum, prohibit any agricultural uses, including but not limited to crops or the breeding and boarding of horses.
- (12) To do all acts and things necessary or convenient to carry out its functions and operations of the TDR and Bank program.
- (d) The members of a Board shall receive no compensation from the Bank but shall be reimbursed for travel, out of pocket expenses, and other expenses related to the performance of duties as Board members.
- (e) Term lengths for members of a Board shall be established by each County, but no term shall be more than three years and no Board member shall serve for more than six consecutive years.

#### **§9134. Reports.**

Each Board shall make an annual report to the Governor and the General Assembly setting forth its operations and transactions, and may make such other additional reports from time to time as it desires.

#### **§9135. Tax Status.**

- (a) The powers and functions exercised by a Board are and will be in all respects for the benefit of the people of the State. A Board will exercise essential governmental functions. To this end no Board shall be required to pay any taxes on assessments or charges of any character, including, without limitation, real property taxes, real estate transfer taxes, taxes on any of its property used, leased or exchanged, or any income or revenue derived from its activities, including, without any limitation, any profit from any sale or exchange of TDR Units.
- (b) There shall be no real estate transfer tax levied on the purchase, transfer, exchange or sale of any TDR Unit.
- (c) Land subject to a preservation easement shall be taxed according to the farmland assessment provisions codified in 9 Del. C. §8335, or its successor.
- (d) There shall be no recording fee or cost charged for the recording of documents relating to the transfer of TDR units from Sending Parcels.
- (e) The Tax Assessment Office, the Planning and Zoning Offices and the Recorder of Deeds office for each County shall cooperate and assist each Board and the Foundation in effectuating the provisions of this Subchapter.

#### **§9136. County and Municipal Authorization.**

(a) Notwithstanding any provision of the law to the contrary, each County and Municipality shall be authorized, but not required, to adopt as part of its Comprehensive Development Plan and subsequent land use ordinances developed pursuant to the requirements of Titles 9 or 22, and certified pursuant to Title 29, Chapter 91 of the Delaware Code, a TDR program which at a minimum:

- (1) Establishes the criteria for determining the number of TDR Units available on each Sending Parcel or part thereof, so that the available number of TDR Units for a parcel can be readily calculated.

- (2) The number of TDR Units available from a parcel shall be determined by the bank board for each County as enabled by this Act.
  - (3) No action taken by the County or Municipality shall result in an effective downzoning as a result of activities related to the TDR program.
  - (4) The transfer of TDR Units to parcels in areas designated by the Office of State Planning Coordination as Investment Level 4 shall not be permitted.
- (b) Any TDR program which is adopted by a County or Municipality as part of a Comprehensive Development Plan and subsequent land-use ordinance pursuant to the Land Use Planning Act, Chapter 92 of Title 29, shall be subject to review for consistency with the Guidelines under the provisions of Subchapter I of Chapter 91, Title 29 of the Delaware Code. No TDR program adopted by a County or Municipality pursuant to this Subchapter shall be implemented unless it is certified pursuant to 29 Del. C. §9103(f).
  - (c) Any County or Municipality operating a certified TDR program which allows for Receiving Parcels within its jurisdiction, shall receive from the Board (or Foundation or other private non-profit entity as the case may be), at the time of transfer and final approval of use of TDR Units to an approved project, in the County or Municipality as the case may be, an amount equal to ten percent (10%) of the proceeds received by the Board from the sale of the TDR Units by the Board. In the case of a private transfer of TDR units not involving the TDR Bank, the County or Municipality shall receive ten percent (10%) of the proceeds received by the owner of the transferring parcel. Said monies shall be used by the County or Municipality for new infrastructure improvements and municipal services demanded by the new higher density development of the Receiving Parcel.
  - (d) The use of TDR Units on any Receiving Parcel shall be subject to compliance with all other applicable federal, state and local requirements, provided however, that no separate or conditional or discretionary approval shall be required with respect to the use of TDR Units in accordance with a TDR program.

**§9137. TDR Bank.**

- (a) Except for private, property owner to property owner transactions, all TDR Units acquired by purchase, transfer, donation or otherwise shall be held in the TDR Bank for sale and use in TDR programs adopted by Counties and Municipalities under this Subchapter.
- (b) The proceeds from the sale of TDR Units shall, after payment to Counties and Municipalities as provided in §9136(c) above, be used to purchase TDR Units and pay for the transaction costs related thereto.
- (c) TDR Units may only be transferred within the same County (and/or any Municipality in the County). For Municipalities located in more than one County, TDR Units may be transferred from either County into any part of the Municipality.
- (d) TDR Units shall be sold on a 'first come/first serve' basis. At the time of purchase, the purchaser shall designate the Receiving Parcel or Receiving Parcels for which the TDR Units are intended. Unused TDR Units purchased from a Bank may be resold back to a Bank at their original purchase price (and the Bank shall

repurchase the same) and may not be resold or sold to other third parties or transferred to other parcels not identified at the time of the original purchase.

**§9138. Administration of Voluntary TDR Program and Banking System**

- (a) The administration of the TDR bank and voluntary program may be conducted in lieu of a Board: (i) by the Foundation under the terms and conditions of a Memorandum of Agreement between the County and the Foundation; or (ii) by another non-profit entity selected by a County, under the terms and conditions of a Memorandum of Agreement between the County and such entity and provided such entity is approved by the Office of State Planning. In the event a non-profit entity administers the TDR bank, the portion of the meetings of the board of directors or other governing body of such entity dealing with the TDR program shall be open to the public as if the entity were subject to Chapter 100 of this Title.
- (b) The Foundation, Board or other authorized non-profit entity as the case may be shall be authorized and responsible for monitoring compliance and enforcing use restrictions imposed on Sending Parcels to the same extent that the Foundation is authorized to enforce, take action, and impose penalties for violations of restrictions under the provisions of 3 Del. C. §920(a) and (b).
- (c) The sale and purchase of TDR Units shall be on a voluntary basis, and the Foundation, Board or other authorized non-profit entity, as the case may be, acting on behalf of the Board, shall not be required to purchase TDR Units from eligible landowners. Eligible landowners shall not be required to sell TDR Units to the Board, or to the Foundation or other authorized non-profit entity acting on behalf of the County.
- (d) A Board may join with the Foundation and/or the Open Space Council in the funding of purchases of both TDR units under this Subchapter, and Preservation Easements under the Foundation's purchase program.
- (e) In the event that a property on which the bank holds a preservation easement is incorporated in a designated growth zone in a certified county or municipal comprehensive plan, or is designated as Investment Level 1, 2 or 3 as part of a future update of the Strategies for State Policies and Spending, the property owner may petition the board to re-purchase their development rights. The bank shall be obligated to sell the development rights back to the property owner at the market value of the TDRs on the date of repurchase. This section shall not be construed to allow the property owner to purchase the development rights back at the original price.

**§9139. Additional Benefits.**

Municipalities and Counties with TDR programs certified pursuant to 29 Del. C. §9103(f) shall be entitled to seek priorities in participation in available State grant and funding programs, including programs which provide local assistance for infrastructure improvements.

**§9140. Saving.**

- (a) Nothing provided in this Subchapter shall prevent a Municipality or County which elects not to participate in the Voluntary TDR program established under this Subchapter from establishing or conducting its own transfer of developments rights program.
- (b) Transfer of development rights programs adopted by Municipalities and Counties and existing at the time of enactment of this Subchapter shall remain in force and effect until modified or abolished, and any transaction, determination or approval which has occurred or which may occur in the future involving an existing transfer of developments rights program shall not be affected by this Subchapter.
- (c) The provisions of this Subchapter and any TDR program adopted by a County or Municipality shall have no effect on the right of such property owner to develop the property consistent with relevant codes and ordinances governing land use and development.
- (d) If any provision of this Subchapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Subchapter which can be given effect without the invalid provision or application, and, to that end, the provisions of this Subchapter are declared to be severable."

Section 3. Amend Chapter 91 of Title 29 of the Delaware Code to provide for a new Subchapter IV to read as follows:

#### **Subchapter IV. Community Development Districts**

##### **§9150. Findings and Purposes.**

The General Assembly finds that in order to better coordinate development, encourage well-designed and efficient communities rather than inefficient sprawl, and to better provide for infrastructure needed for development, a better mechanism needs to be created for the coordination between the state, local governments, and local property owners. Community Development Districts are hereby authorized pursuant to the terms and conditions of this Chapter.

##### **§9151. Definitions.**

For purpose of this Subchapter the following definitions shall apply:

- (a) **'Bonds' or 'bond'** means a special obligation bond, revenue bond, note or other similar instrument issued by any county or municipality in accordance with this section.
- (b) **'Community Development District' or 'CDD' or 'District'** means an area of land so designated by a Local Government pursuant to the provisions of this Chapter. Parcels of land in a District need not be contiguous, but they must all be located within the same Local Government.
- (c) **'Cost' or 'Costs'** includes the cost of:
  - (1) Construction, reconstruction and renovation, and acquisition of all lands, structures, real or personal property, rights, rights-of-way, franchises,

- easements and interests acquired or to be acquired by a municipality for a public purpose;
- (2) All machinery and equipment including machinery and equipment needed to expand or enhance municipal services to the community development districts created pursuant to § 9152 of this title;
  - (3) Financing charges and interest prior to and during construction, and, if deemed advisable by the municipality, for a limited period after completion of the construction, interest and reserves for principal and interest, including costs of municipal bond insurance and any other type of financial guaranty, liquidity support and costs of issuance;
  - (4) Extensions, enlargements, additions and improvements;
  - (5) Architectural, engineering, financial and legal services;
  - (6) Plans, specifications, studies, surveys and estimates of cost and of revenues;
  - (7) Administrative expenses necessary or incident to determining to proceed with the infrastructure improvements; and
  - (8) Other expenses as may be necessary or incident to the construction, acquisition, financing and operation of the infrastructure improvements including administrative expenses charged to collect and/or administer the tax revenues.
- (d) **'County'** or **'county'** means New Castle County, Kent County or Sussex County.
  - (e) **'Floor Area Ratio'** shall mean the ratio of gross floor area of all structures on the parcel to the total land area of the parcel.
  - (f) **'Investment Level'** means a designation by the Office of State Planning Coordination regarding planned infrastructure and state investment in the area so designated and ranging from level 1 through level 4.
  - (g) **'Local Government'** means a County or Municipality.
  - (h) **'Master Plan'** means the master plan put into place for a District by a Local Government at the time of creation of the District.
  - (i) **'Municipality'** means any town or city located within the State.
  - (j) **'TDR'** shall mean transfer of development rights.
  - (k) **'TDR Unit'** shall mean a residential development unit or equivalent, which is acquired from the Bank or from a private property owner and utilized by the owner of the Receiving Parcel to increase development density. A TDR unit shall equal one residential unit. The bank board for each County, as enabled by this subchapter, shall determine the conversion value of a TDR unit that is to be used for non-residential density transfers, which shall be between 3,000 to 6,000 square feet of building space per acre of restricted land.

#### **§9152. Creation of Community Development Districts.**

A Community Development District may be created by ordinance of a Local Government provided that the owners of at least seventy-five percent (75%) of the area proposed for such District agree in writing to be included in the District in (1) any growth zone in any County or Municipal comprehensive plan that has been certified in accordance with Title 29, Chapter 91; or (2) any area of a county or municipality designated as Investment Level 1, 2 or 3 in the Strategies for State Policies and Spending.



**§9153. Base Density and TDR's.**

- (a) Notwithstanding any other regulation or restriction of a Local Government, all Community Development Districts shall have a base gross density (calculated based upon the total acreage of the site) as follows:
  - (1) for residentially-zoned property in a municipality, or annexed into a municipality, a base gross density ranging from a minimum of 2.5 to a maximum of 5.0 residential units per acre;
  - (2) for non-residentially zoned property in a municipality, or annexed into a municipality, a base gross density ranging from a minimum of .20 Floor Area Ratio to a maximum of .30 Floor Area Ratio;
  - (3) for residentially-zoned property in a County, a base gross density ranging from a minimum of 1.0 to a maximum of 3.0 residential units per acre;
  - (4) for non-residentially zoned property in a County, a base gross density ranging from a minimum of .15 Floor Area Ratio to a maximum of .20 Floor Area Ratio.
- (b) As part of each Community Development District, a property owner or owners must purchase or otherwise obtain TDR's so that overall density of property in the District increases over the base gross density by at least 2 residential units per acre (for the residential portion of the CDD) and increases the Floor Area Ratio to at least .30 in counties and to at least .40 in municipalities (for the non-residential portion of the CDD). TDR's may be obtained through Subchapter III hereof, or by private purchase, provided that if by private purchase, the property transferring development rights is restricted by preservation easement duly recorded in the appropriate Recorder of Deeds' Office in accordance with the applicable rules and regulations of the Local Government in which the CDD is located. The restricted property need not be in the same jurisdiction as the CDD.
- (c) A Community Development District shall include both residential and non-residential uses.

**§9154. Infrastructure Master Plan For Community Development Districts.**

Property in a Community Development District shall be developed in accordance with a Master Plan adopted by the Local Government at the time of the creation of the CDD. The Master Plan shall set forth the maximum permitted development for each parcel in the CDD and, based upon such development, the amount of infrastructure resources and/or improvements (sewer, highway and road capacity, water, and other utilities) needed for the development of such CDD. The Master Plan shall also set forth the percentage contribution each parcel owner is to pay towards the cost of the infrastructure resources and improvements. To the extent infrastructure improvements will alleviate existing shortfalls or provide excess capacity beyond that required by the parcels making up the CDD, the cost of such alleviation or excess capacity shall be paid by the Local Government (in the case of services provided by the Local Government such as sewer) or by the Delaware Department of Transportation (in the case of road and highway

improvements). A district shall not be required to address existing infrastructure shortfalls but shall only be required to provide additional infrastructure necessary for the planned development of the District so as not to worsen any existing shortfalls. The Infrastructure Master Plan shall be required to be reviewed through the pre-application review process described in Title 29, Chapter 92.

**§9155. Infrastructure Development Agreements And Community Development Districts.**

- (a) The cost of the infrastructure improvements called for in the Master Plan for a Community Development District may be paid for in one of two ways:
  - (1) pursuant to a private agreement entered into between all of the property owners and the Local Government and, to the extent road or highway improvements to any roads which are the responsibility of the Department of Transportation; or,
  - (2) For purposes of this subchapter and the creation of CDD's, any local government is hereby authorized to develop financial mechanisms for infrastructure funding as described in Title 22, Chapter 18. Any CDD created pursuant to this subsection shall be exempt from the requirements of Chapter 69 of this Title.
- (b) At the time of creation of the Community Development District by the Local Government, each property owner in the District shall sign an agreement (the "Infrastructure Development Agreement") with the Local Government. The Infrastructure Development Agreement shall set forth the infrastructure required by the Master Plan (if known) or the process by which the infrastructure needs will be determined. It shall also set forth the manner of payment for such infrastructure. Where the financing option set forth in subsection (a)(1) above is to be used, the Master Agreement shall also set forth the timing and method for payments required for the infrastructure to be built. Where a Special Development District is to be used, the Master Agreement shall so state and the requirements of 22 Del. C. §1803(a)(1) and (2) are deemed waived. The agreement (or a memorandum thereof) shall be recorded with the appropriate Recorder of Deeds and shall bind future property owners.
- (c) As part of the Infrastructure Development Agreement, a property owner or property owners may agree to construct all or a portion of the infrastructure called for under the Master Plan, and shall receive a credit against payments for infrastructure, the terms and conditions thereof to be set forth in the agreement.

**§9156. Land Use Approval Process In A Community Development District.**

Notwithstanding the requirements of a Local Government which might otherwise be applicable, no proposed development for a parcel in a Community Development District which does not exceed the development permitted for such parcel in the Master Plan shall (i) be subject to pre-application review process under Title 29, Chapter 92; (ii) be required to prepare or submit a traffic impact study; and (iii) be subject to any limitations on the amount of development otherwise applicable to the proposed development due to limited amounts of infrastructure or utility capacity. Development in

a CDD may, however, be subject to phasing so that certificates of occupancy are not issued before sufficient sewer (whether public sewer, community septic or private septic) and water capacity (whether public water, private utility, or private well) is available for the phase of the Development."

### Synopsis

This bill provides two major components for better land use planning and development in Delaware. First, the bill sets up a process for the transfer of development rights ("TDR") and sets up a TDR bank. Second, the bill provides for the creation of Community Development Districts--districts which are created to provide for financing of infrastructure needed for the development of the District and which must utilize TDR's.

These two components working together should address several problems. They will help save open space by encouraging the transfer of development rights and by providing for higher density where development does occur. They will also provide more funding for the construction of needed infrastructure so that this burden does not fall entirely on existing property owners.